

**Iowa Department of Natural Resources  
Environmental Protection Commission**

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**ITEM**

**8**

**DECISION**

**TOPIC**

**Anthony Herman dba Mighty Good Used Cars  
Appeal of Proposed Decision**

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On February 5, 2008, the Department of Natural Resources (Department) issued Administrative Order No. 2008-WW-03 (Order) to Anthony Herman dba Mighty Good Used Cars for violations of Department rules regarding storm water control and discharge. The Order required Mr. Herman to revise his pollution prevention plan to prevent further discharge of contaminants by March 1, 2008, to implement the revised pollution plan by April 1, 2008, and to pay an administrative penalty of \$7,500. That action was appealed. A hearing regarding the appeal of the order was held on September 23, 2008 and the administrative law judge issued a Proposed Decision on October 6, 2008. At the time of the hearing, Mr. Herman had revised his pollution prevention plan and the plan had been implemented. Therefore, the only issue left to be resolved was the penalty amount. In the Proposed Decision, the administrative law judge reduced the penalty to \$3,000. Mr. Hermann has appealed the proposed decision.

Attached to this item is the Department's Appeal Brief, the ALJ's Proposed Decision, and Mr. Herman's Notice of Appeal and Amended Notice of Appeal. The Exhibits offered at hearing and the transcript of the contested case hearing are available to the Commission upon request and will be made available at the Commission meeting. The Commission will consider the attached information, the exhibits admitted at the hearing of this matter, and possible oral arguments from the Department and Mr. Herman's counsel in making a final determination. The Commission's decision will become the final agency action.

Edmund J. Tormey, Chief  
Legal Services Bureau

December 18, 2008

**BEFORE THE IOWA ENVIRONMENTAL PROTECTION COMMISSION**

**IN THE MATTER OF:**

**ANTHONY HERMAN  
dba Mighty Good Used Cars;  
Polk County, Iowa**

**DEPARTMENT'S APPEAL BRIEF**

**DIA NO: 08DNR018**

On February 5, 2008, the Department of Natural Resources (Department) issued Administrative Order No. 2008-WW-03 (Order) to Anthony Herman dba Mighty Good Used Cars for violations of Department rules regarding storm water control and discharge. The Order required Mr. Herman to revise his pollution prevention plan to prevent further discharge of contaminants by March 1, 2008, to implement the revised pollution plan by April 1, 2008, and to pay an administrative penalty of \$7,500. That action was appealed. A hearing regarding the appeal of the order was held on September 23, 2008 and the administrative law judge issued a Proposed Decision on October 6, 2008. At the time of the hearing, Mr. Herman had revised his pollution prevention plan and the plan had been implemented. Therefore, the only issue left to be resolved was the penalty amount. In the Proposed Decision, the administrative law judge reduced the penalty to \$3,000. Mr. Hermann has appealed the proposed decision.

**STATEMENT OF FACTS**

The Department does not dispute the Findings of Fact set forth in the Proposed Decision and therefore incorporates those facts herein by reference.

**STANDARD OF REVIEW**

The Iowa Administrative Procedure Act states that:

On appeal from or review of the proposed decision, the agency has all the power which it would have in initially making the final decision except as it may limit the issues on notice to the parties or by rule. The agency may reverse or modify any finding of fact if a preponderance of the evidence will support a determination to reverse or modify such a finding, or may reverse or modify any conclusion of law that the agency finds to be in error. In cases where there is an appeal from a proposed decision or where a proposed decision is reviewed on motion of the agency, an opportunity shall be afforded to each party to file exceptions, present briefs and, with the consent of the

agency, present oral arguments to the agency members who are to render the final decision.

Iowa Code section 17A.15(3).

### **ISSUE RAISED BY THE DEPARTMENT ON APPEAL**

#### **I. Whether the reductions in penalty by the Administrative Law Judge were justified by the record established in this contested case.**

Iowa Code section 455B.191 authorizes the assessment of civil penalties of up to \$5,000.00 per day of violation for violations of the type cited in Administrative Order 2008-WW-18. Iowa Code section 455B.109 authorizes the assessment of administrative penalties up to \$10,000.00 for violations of chapter 455B or rules, permits or orders adopted or issued under this chapter. 567 IAC chapter 10 was adopted to implement Iowa Code section 455B.109.

567 IAC 10.2 establishes the criteria used for determining an appropriate penalty. Chapter 10.2 assesses the violation in three main areas: cost savings through noncompliance or economic benefit, gravity of the violation, and culpability of the violation. The gravity of the violation takes into account the following: actual or threatened harm to the environment or the public health and safety; involvement of toxic or hazardous substances or the potential long-term effects of the violation; the degree to which ambient or source-specific standards are exceeded, where pertinent; federal program priorities, size of facility, or other pertinent factors; whether the violation is repeated and whether it violates an administrative or court order; whether the type of the violation threatens the integrity of a regulatory program; and expenses or efforts by the government in detecting, documenting, or responding to a violation. The culpability factor takes into consideration the following: the degree of intent or negligence. The standard of care required by the laws of the state of Iowa will be considered; whether the case involves false reporting or required information, or tampering with monitoring devices; and whether the violator has taken remedial measures or mitigated the harm caused by the violation.

**A. Economic Benefit Assessment.** The Administrative Law Judge found that the Department's assessment of \$1,000 for the economic benefit portion of the penalty was not unreasonable and affirmed that portion of the penalty. The Department supports this finding. The violations established in this case were wholly avoidable through the implementation of proper management practices. There are labor and other costs associated with these practices that were avoided in this case which support the imposition of the economic benefit assessment.

**B. Gravity Assessment.** The Administrative Law Judge determined that the Department's assessment of \$4,000 for the gravity portion of the penalty was not justified and reduced that assessment to \$1,000. Factor's considered by the Administrative Law Judge to warrant reduction of the penalty include:

- “Salvaging was a relatively small portion of Mr. Herman’s business”;
- “It did not appear that this was a large spill and there was no evidence that the contaminants moved beyond the storm sewer and road ditch”;
- “There is no evidence that there were discharges to the storm sewer on multiple days”; and
- “The property has remained clean since March 15, 2007.

The Department disputes these assertions, based upon the facts contained in the Findings of Fact, and the evidence presented at the contested case hearing. The Department specifically notes the following:

a. There are no provisions in rule or law that diminish the responsibility to obtain a storm water discharge permit based upon the percentage of a business that is dedicated to a regulated activity.

b. During the inspection of the facility on December 1, 2006, Environmental Specialist Bill Gibbons observed a 10-foot by 10-foot area where gasoline and possibly oil had been spilled. *Findings of Fact, paragraph #3*. This fact indicates past practices that made the discharge of contaminated storm water likely. This fact is consistent with the complaint of potential contaminated storm water discharges. *Findings of Fact, paragraph #2*.

c. Mr. Gibbons observed that contaminated storm water had been intentionally drained from the site into a storm sewer and had also overflowed the lot toward the ditch and storm water intake. Additionally, Mr. Gibbons observed soil staining that indicates prior runoff of contaminated storm water. *Findings of Fact, paragraph #10* The facts contained in Paragraph #10 of the Findings of Fact in regard to site conditions directly contradict the allegation that there was no evidence of storm water discharges on multiple days. This basis for the reduction of penalty would establish a precedent that the Department may only base a penalty upon violations that were directly observed by the Department even when relevant evidence establishes that additional violations or days of violation have occurred.

d. The reduction of the penalty in the Proposed Decision based upon the lack of evidence that contaminated storm water moved beyond the storm sewer and road ditch was inappropriate. There is nothing unique about this storm sewer that would prevent the flow or discharge of contaminants. Mr. Herman presented admissible hearsay evidence indicating that the storm water outlet was plugged by debris in March of 2007 but there is no reason to believe that the outlet had been plugged at all prior times and no evidence presented indicating that the alleged debris plug prevented all flow of storm water. It is logical and expected that contaminants discharged to the storm sewer would not continue to move through the system. The reduction of the penalty based upon this assertion establishes a precedent that once a pollutant is washed away, its discharge can no longer be considered.

e. The reduction of the penalty due to later compliance is inappropriate in a gravity assessment. The initial gravity assessment was based upon past violations and the fact that Mr. Herman did not continue those violations after they were discovered by the Department neither diminishes those violations or is an appropriate consideration pursuant to the gravity considerations set forth in 567 IAC 10.2(2). Later compliance is

an appropriate consideration under the culpability portion of the penalty assessment and the Department duly considered this mitigating factor.

Therefore the Department requests that the Commission reinstate the \$4,000 penalty originally assessed based upon the gravity of the violations committed by Anthony Herman.

**C. Culpability Assessment.** The Administrative Law Judge determined that the Department's assessment of \$2,500 for the culpability portion of the penalty was not justified.

In the Order, the Department asserted the following justification for the assessment of a \$2,500 penalty for the culpability factor:

Culpability. Mr. Herman was informed of the applicable regulations and he eventually obtained storm water permit coverage. However, subsequent to the receipt of the permit and the partial development of the pollution prevention plan, Mr. Herman engaged in practices that led to the discharge of contaminated storm water from the property and into a storm water intake. The lack of an enforcement history and the changes undertaken by Mr. Herman subsequent to March 13, 2007 provide some mitigation in regard to culpability. Based upon the above considerations, \$2,500 is assessed for this factor.

The Proposed Decision contains the following finding:

"A culpability assessment is warranted because Mr. Herman was negligent in implementing his pollution prevention plan following the issuance of the storm water permit, despite specific guidance from the DNR and warnings about the risk of contaminated runoff when the snow from the large storm melted. In addition, using a hose to drain standing water from the property likely accelerated the movement of contaminants to the storm sewer and the road ditch."

However, the Proposed Decision reduces the culpability assessment to \$1,000. In support of this reduction the Administrative Law Judge stated:

"Although Anthony Herman should have known that his salvaging operations required a storm water permit, there is no evidence that his initial failure to obtain a permit was intentional. Although he disagreed with the directive to obtain a permit, Anthony Herman applied for the permit promptly. In the eleven months after this incident and prior to the issuance of the Administrative Order, Mr. Herman has complied with all permit requirements. These factors support a \$1000 assessment for culpability"

The penalty justification contained in the Order provides mitigation for subsequent compliance and does not place any emphasis on the failure to obtain a storm water permit. The penalty justification has only one accusatory statement on which to base the

penalty, *"However, subsequent to the receipt of the permit and the partial development of the pollution prevention plan, Mr. Herman engaged in practices that led to the discharge of contaminated storm water from the property and into a storm water intake."* The record in this case establishes that such discharge was intentional via the placement of the hose. The record further establishes that Mr. Griffin warned that unintentional discharge would result from a failure to act. As noted by the Administrative Law Judge, Mr. Herman acted negligently despite the specific guidance of the Department and warnings about the risk of contaminated runoff. These facts justify a culpability penalty of \$3,000, which was then reduced by the Department to \$2,500 due to the mitigating factors. The reduction in the Proposed Decision results in the double consideration of the mitigating factors thereby unjustly reducing the penalty.

Therefore the Department requests that the Commission reinstate the \$2,500 penalty originally assessed based upon the culpability of Anthony Herman relative to the violations established in this case.

#### **RESPONSE TO MR. HERMAN'S APPEAL TO THE PROPOSED DECISION**

The Appellant's Amended Notice of Appeal fails to set forth any specific grounds for appeal. The Department resists the Appeal in its entirety.

#### **RELIEF REQUESTED BY THE DEPARTMENT**

The Department respectfully requests, based upon the arguments set forth herein, that the Proposed Decision be modified by the Commission to conform to the penalty justifications set forth above and that the Administrative Penalty of \$7,500 contained in Administrative Order No. 2008-WW-18 be reinstated.

Respectfully Submitted,

IOWA DEPARTMENT OF NATURAL RESOURCES

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ATTORNEY FOR THE DEPARTMENT

CERTIFICATE OF SERVICE

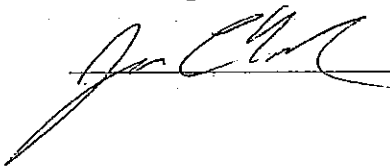
I certify that a copy of the foregoing was placed in the United States mail on December 18, 2008, addressed as follows:

Ernest Kersten

Attorney at Law

805 Central Ave, Suite 603

Fort Dodge, IA



Iowa Department of Inspections and Appeals  
Division of Administrative Hearings  
Wallace State Office Building  
Des Moines, Iowa 50319

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IN THE MATTER OF: )  
 ) PROPOSED DECISION  
ANTHONY HERMAN )  
dba Mighty Good Used Cars; ) DIA NO: 08DNR018  
Polk County, Iowa )

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On February 5, 2008, the Iowa Department of Natural Resources (DNR) issued Administrative Order No. 2008-WW-03 to Anthony Herman, dba Mighty Good Used Cars (appellant). The administrative order required the appellant to revise his pollution prevention plan to prevent further discharge of contaminants by March 1, 2008, to implement the revised pollution plan by April 1, 2008, and to pay an administrative penalty of \$7,500. A hearing was scheduled for July 18, 2008, but the hearing was continued at the DNR's request. The hearing was held before Administrative Law Judge Margaret LaMarche on September 23, 2008 at 9:30 a.m. Attorney Jon Tack appeared for the DNR. Appellant Anthony Herman dba Mighty Good Used Cars was represented by attorney Ernest Kersten.

THE RECORD

The record includes the Administrative Order; Notice of Appeal; Notice of Hearing; Motion to Continue and Continuance Order; Petition; Answer; testimony of the witnesses; and DNR Exhibits 1-11 (see exhibit index for description).

FINDINGS OF FACT

1. Anthony Herman has owned and operated Mighty Good Used Cars, located at 300 Sandpiper Court in Polk City, Iowa, since 1999. Mr. Herman also operates a Car Wash and Quick Lube business at this location, where he has approximately 12 employees. Prior to 2005, Mr. Herman had a recycler's license for a business in Sigourney, Iowa, but he transferred the recycling license to his Polk City location. Polk City approved the license transfer.



Mighty Good Used Cars buys and sells used cars. If Mr. Herman purchases a car or takes a car in trade that cannot be repaired for resale, it is eventually transported to Alter Scrap Processing, a recycling business in Des Moines. Before a car is transported to Alter's, the gas tank must be drained to ensure that the car will not explode when it goes through the shredder. The car is put up on a metal rack and a 55 gallon barrel, which is cut in half and on wheels, is placed underneath the car to catch the gasoline. The gasoline is later transferred to smaller containers and reused in the company's vehicles. After the gas tank is drained, employees use a shears to open the tank up so that the employees at Alter's can readily see that it is empty. Motor oil and radiator fluid are not typically drained from the cars, but reusable tires or wheels are removed for later resale. The entire processing area is paved. (Testimony of Anthony Herman; DNR Exhibit 2)

2. On November 7, 2006, the DNR received a complaint from the Polk City City Administrator<sup>1</sup> alleging that Anthony Herman was draining fluids from vehicles without having a collection system, resulting in possible storm water run-off. (DNR Exhibit 1) On November 29, 2006, the DNR received a second complaint alleging that Mr. Herman was dumping oil, gasoline and antifreeze on the ground and down the sanitary sewer. (DNR Exhibit 2)

3. On December 1, 2006 at 1:35 p.m., DNR Environmental Specialist Bill Gibbons conducted an inspection at Mighty Good Used Cars. Mr. Gibbons observed that the business was processing junk cars behind the shop by putting them up on one of two metal racks, where they removed and drained the gas tanks and removed wheels and tires. An employee told Mr. Gibbons that the drained gasoline was saved and used in company vehicles but that no other fluids were drained. Mr. Gibbons observed a 10' x 10' area where gasoline and possibly oil had been spilled. It was not raining, and Mr. Gibbons did not observe any run-off from the processing area. He did observe four lead-acid batteries sitting on

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<sup>1</sup> The Complainant suggested that DNR staff should be accompanied by the sheriff when visiting the business because Mr. Herman was dangerous. DNR staff did not contact the sheriff, and Mr. Herman has been cooperative with the DNR throughout its investigation. Based on Mr. Herman's testimony and some of the exhibits, it appears that Mr. Herman and Polk City officials have had a contentious relationship. (Testimony of Anthony Herman; DNR Exhibit 1)

the ground outside the shop building. (Testimony of Bill Gibbons; DNR Exhibit 2)

4. On December 6, 2006, Bill Gibbons spoke to Anthony Herman by telephone. Mr. Herman described the process used to drain gas tanks on the junk cars and to salvage usable wheels and tires for resale. Mr. Gibbons asked Mr. Herman about the northeast corner of the processing area where fluids had been spilled. Mr. Herman responded that his employees apply "Oil Dry" when fluids were spilled and then placed the material in the dumpster. Anthony Herman purchases "Oil Dry" in 20-25 pound bags, typically in loads of 20 bags at a time. (Testimony of Bill Gibbons; Anthony Herman; DNR Exhibit 2)

Bill Gibbons told Anthony Herman that processing vehicles and reselling wheels and tires constituted salvaging and therefore he was required to obtain a General Permit No. 1 for Stormwater Discharge Associated with Industrial Activity. Mr. Gibbons further informed Mr. Herman that he would need to develop a pollution prevention plan that addressed best management practices used in processing the vehicles to prevent spillage and runoff of possible contaminants. (Testimony of Bill Gibbons; DNR Exhibit 2)

5. On December 29, 2006, Jim Stricker, the supervisor of DNR Field Office #5, sent Anthony Herman a letter that summarized Bill Gibbons' inspection findings and his subsequent telephone conversation with Mr. Herman. Mr. Stricker warned that during rainfall events there was a potential for runoff of spilled fluids from the pavement to nearby surface waters and storm sewers. In addition, he warned that lead-acid batteries sitting outside can contribute to runoff of lead and battery acid. The letter further stated that:

- All fluids must be properly collected and contained during processing and any spilled fluids should be immediately cleaned up;
- Lead-acid batteries must be kept off the ground and stored in a covered container;
- Since this is a salvaging operation where parts of vehicles are removed and some parts later resold, the facility must have a General Permit No. 1 for Storm Water Discharge Associated with Industrial Activity.

Mr. Stricker described the process for applying for General Permit No. 1 and enclosed an application packet. Mr. Herman was directed to submit a Notice of Intent, proof of two Public Notices of Storm Water Discharge, and the permit fee to the DNR's Storm Water Section by January 30, 2007. Mr. Stricker further stated that a follow up inspection would be conducted to review the pollution prevention plan and observe the on-site implementation of the plan. (DNR Exhibit 3)

6. On December 29, 2006, the DNR received a complaint about excessive waste tire storage and storm water pollution at Mr. Herman's business. Bill Gibbons contacted the complainant and informed him that he had already addressed these issues with Anthony Herman and a follow-up inspection would be conducted. (DNR Exhibit 4)

7. On January 10, 2007, the DNR received an anonymous complaint of a petroleum smell at Anthony Herman's business. No action was taken in response to this complaint. (Testimony of Bill Gibbons; DNR Exhibit 5)

8. By February 8, 2007, Anthony Herman had filed his Notice of Intent for Storm Water NPEDES Permit under General Permit #1 for Industrial Activity and had paid a \$300 permit fee, even though he was not entirely convinced that his operation required a permit. However, due to some confusion over whether Mr. Herman also owed back permit fees, notification of issuance of the permit was delayed until March 1, 2007. The DNR eventually determined that Mr. Herman did not owe back permit fees. (Testimony of Bill Gibbons; DNR Exhibits 6, 7)

9. On or about March 3, 2007 there was a large snowstorm in Polk City, and the interstate was temporarily shut down. (Testimony of Anthony Herman) On March 5, 2007, Bill Gibbons inspected the Mighty Good Used Cars site, reviewed the pollution prevention plan, and noted certain deficiencies. Specifically, the plan had not been reviewed and signed by all employees, it did not include a site map, and it did not include best management practices for every activity at the site. The pollution prevention plan explained that fuel tanks were emptied but not removed from the vehicles, batteries were covered or stored inside, no oil or antifreeze was removed or stored on-site, and scrap tires were taken to Green Man for recycling.

While he was at the property, Bill Gibbons observed evidence that fluids such as gasoline, oil, and antifreeze had spilled on the pavement. The work area was on the east side of the lot next to an embankment that sloped down to a road ditch. Snow piled on the east side of the lot was dark and dirty and appeared to contain fluids spilled from the work area. Mr. Gibbons warned employee Susan Morburg that when the snow melted, the storm water would likely run off the embankment into the road ditch and to the storm sewer intake, carrying the contaminants from the work area with it. (Testimony of Bill Gibbons; DNR Exhibit 10)

10. By March 13, 2007, the snow was melting and Anthony Herman's employees were trying to clean up the business property. In addition to the melting snow on the Mighty Good Used Cars' property, the employees were also attempting to divert runoff from snow piled behind the nearby apartment buildings. (Testimony of Anthony Herman; DNR Exhibit 8, p. 10)

On March 13, 2007, a Department of Transportation employee contacted the DNR and reported storm water runoff from the Mighty Good Used Cars' property and a hose that was being used to drain water from the lot area to the storm sewer at the corner of the highway and Sandpiper Court.

Bill Gibbons went to the Mighty Good Used Cars property and took photographs. He observed a hose extended from the northeast corner of the lot area to near the storm sewer at the bottom of the embankment, and the lid of the storm water intake had been removed. However, both ends of the hose were lying on the ground, and the hose was not draining water. (Testimony of Bill Gibbons; DNR Exhibit 8, pp. 6, 9, 10)

Mr. Gibbons observed standing water in the lot area that was bordered by curbing, and this water had a petroleum sheen floating on top. (DNR Exhibit 8, p. 7) There were three buckets in the work area that had been used to collect fluids, and at least one bucket contained antifreeze. (DNR Exhibit 8, p. 15). In the area where the storm water was running off the lot and over the embankment, Mr. Gibbons observed that the grassy area and gravel was discolored, consistent with petroleum contamination. (DNR Exhibit 8, p. 11) Mr. Gibbons looked into the storm sewer and observed petroleum sheen on the water inside, which seemed consistent with the material he

observed in the standing water on the lot. (DNR Exhibit 8, p. 1) Mr. Gibbons also observed water in the road ditch alongside the highway in front of Mr. Herman's property. There was filmy material and petroleum sheen on the water, which was consistent with the petroleum sheen he observed on the water in Mr. Herman's parking area and in the storm sewer. (DNR Exhibit 8, p. 11)

In the tire storage area, Mr. Gibbons observed discolored soil that appeared to indicate prior runoff. An absorbent boom had been placed in this area. (DNR Exhibit 8, p. 12) Mr. Gibbons also observed a number of uncovered lead acid batteries sitting on the pavement outside the building. (DNR Exhibit 8, p. 13) Mr. Gibbons observed evidence of fluid spillage near the buckets that had been placed below the metal stands used to elevate the cars. He also observed "Oil Dry" which had been placed on the ground to absorb the spillage. (DNR Exhibit 8, pp. 14-16) (Testimony of Bill Gibbons)

Mr. Gibbons advised Anthony Herman to clean the contamination off the water in the storm sewer and off the lot in the work area, to excavate the contaminated soil from the embankment area and dispose of it at a landfill that accepts contaminated soil, to store the lead acid batteries off the ground and in a covered container, and to clean up the work area and implement practices to catch and contain the fluids draining from vehicles. (Testimony of Bill Gibbons; DNR Exhibit 11)

11. On March 15, 2007, Bill Gibbons revisited Anthony Herman's property and observed that all of the violations had been corrected. The work area had been moved away from the embankment to the east wall of the shop building and had a perimeter of sand bags around it. Mr. Herman had used absorbent pads and "spag sorb" to clean up the contamination on top of the water in the storm sewer and in the lot. The lot was dry, the batteries had been moved and were stored on pallets under cover, and there were bags of "Oil Dry" lined up nearby and ready to be used in the event of a spill. All contaminated soil had been excavated and replaced with new gravel. The pollution prevention plan had been reviewed and signed by all employees. Mr. Herman later provided landfill receipts for the contaminated soil from the North Dallas Landfill. (Testimony of Bill Gibbons; DNR Exhibits 9; 10)

12. On April 25, 2007, Bill Gibbons sent Anthony Herman a Notice of Violation for unauthorized discharge of contaminated storm water into the Polk City storm sewer, in violation of 567 IAC 64.3(1). A copy of the investigation report was attached. (Testimony of Bill Gibbons; DNR Exhibit 10)

13. On February 5, 2008, the DNR issued Administrative Order 2008-WW-03, which required Anthony Herman to revise his pollution prevention plan by March 1, 2008, to implement the plan by April 1, 2008, and to pay a civil penalty of \$7,500. On April 7, 2008, Bill Gibbons revisited Anthony Herman's property for a follow-up compliance inspection. The work area was clean and there was no evidence of spills that had not been cleaned up. Anthony Herman had the same pollution prevention plan that had been reviewed on March 15, 2007, which had been deemed sufficient at that time. Mr. Herman had his employees review and sign the pollution prevention plan and sign it again. Mr. Herman and his employees were following the procedures in the plan. (Testimony of Bill Gibbons; DNR Exhibit 11)

## CONCLUSIONS OF LAW

### *I. The Violations*

Iowa Code section 455B.173(3)(2007) authorizes the Environmental Protection Commission (Commission) to adopt rules relating to the operation and issuance of permits to waste disposal systems. Iowa Code section 455B.103A authorizes the issuance of general permits for storm water discharges. The Commission has adopted regulations pertaining to the issuance of National Pollutant Discharge Elimination System (NPDES) permits for storm water discharge at 567 IAC 60.2 and 64.3 through 64.16.

567 IAC 60.2 provides that "Storm water discharge associated with industrial activity" means the discharge from any conveyance which is used for collecting and conveying storm water and which is directly related to manufacturing, processing or raw materials storage at an industrial plant. The regulation further provides that the categories of facilities considered to be engaging in "industrial activity" include facilities involved in the recycling of materials, including metal scrap yards,

battery reclaimers, salvage yards, and automobile junkyards.

567 IAC 64.15(1) adopts Storm Water Discharge Associated with Industrial Activity, NPDES General Permit No. 1. Upon submittal of a complete Notice of Intent in accordance with subrule 64.6(1) and 64.3(4)"b," the applicant is authorized to discharge, unless notified by the DNR to the contrary. Subrule 64.3(1) provides that no person shall operate any wastewater disposal system, or part thereof without, or contrary to any condition of any permit issued by the Director.

General Permit No. 1, Part IV provides that the permittee must develop and implement a pollution prevention plan in accordance with good engineering practices to prevent and reduce the amount of pollutants in storm water runoff. 567 IAC 64.3(1) provides that no person shall operate any wastewater disposal system or part thereof without, or contrary to any condition of, an operation permit issued by the Director.

The preponderance of the evidence established that on March 13, 2007, Anthony Herman dba Mighty Good Used Cars violated 567 IAC 64.3(1), when he and/or his employees allowed storm water containing petroleum contamination to runoff his property, in violation of the pollution prevention plan and conditions of General Permit No. 1. The pollution prevention plan required Mr. Herman to implement best management practices to prevent the runoff of pollutants to surface waters or storm waters. This is best accomplished by preventing spills of contaminants in the first place or by promptly and thoroughly cleaning up any spills that do occur. The observation of Bill Gibbons, coupled with the photographs taken on March 13, 2007, constituted persuasive evidence that petroleum contaminants were discharged in storm water running off Mr. Herman's property. Mr. Herman and/or his employees could and should have taken appropriate steps prior to March 13, 2007 to prevent the discharge of contaminants in the storm water. They failed to do so despite specific warnings from Bill Gibbons on March 5, 2007.

## *II. The Civil Penalty*

Iowa Code section 455B.109 authorizes the Commission to establish rules for the assessment of civil penalties of up

to ten thousand dollars (\$10,000) per violation and provides that in proposing or assessing a penalty, the commission and director shall consider the costs saved or likely to be saved by non-compliance by the violator, the gravity of the violation, the degree of culpability of the violator, and the maximum penalty authorized for that violation under this chapter. Iowa Code section 455B.191 authorizes the assessment of civil penalties of up to \$5,000 per day of violation for the type of violations in this case.

567 IAC chapter 10 was adopted by the Commission to implement Iowa Code section 455B.109. It establishes the criteria for screening and assessing administrative penalties. In determining whether a violation is appropriate for the administrative assessment of civil penalties, the department will consider relevant factors. The factors include, in relevant part:

- 1) Costs saved or likely to be saved by noncompliance by the violator. Where the violator realizes an economic benefit through the violation or by not taking timely compliance or corrective measures, the department shall take enforcement action which includes penalties which at least offset the economic benefit. Reasonable estimates of economic benefit should be made where clear data are not available. 567 IAC 10.2(1).

- 2) Gravity of the violation, including, in part, the actual or threatened harm to the environment or to public health and safety and whether the type of violation threatens the integrity of the regulatory program.. 567 IAC 10.2(2) "a," "f."

- 3) Culpability, including the degree of intent or negligence; whether the case involves the false reporting of required information or tampering with monitoring devices; and whether the violator has taken remedial measures or mitigated the harm caused by the violation. 567 IAC 10.2(3)

- 4) The maximum penalty authorized for that violation under Iowa Code chapter 455B... 567 IAC 10.2(4)

- 5) Whether the assessment of administrative penalties appears to be the only or most appropriate



way to deter future violations, either by the person involved or others similarly situated. 567 IAC 10.2(5).

6) Other relevant factors which arise from the circumstances of each case. 567 IAC 10.2(6)

At the time of the Administrative Order, the DNR considered economic benefit, gravity of the violation, and culpability to determine a total civil penalty of \$7500.

#### *A. Economic Benefit*

The assessment of \$1,000 for economic benefit was based on the additional labor costs that should have been expended to avoid the contamination of the storm water in the first place, as well as labor and disposal costs related to the proper disposal of the contaminated soil and storm water. Based on this record, it appears that most of the actual cost savings were for labor, since most of the materials necessary for clean up were already on site. In addition, Mr. Herman did incur clean up costs after March 13, 2007. Nevertheless, it would have required additional labor hours to implement best management practices all along, including additional efforts to prevent spills and interruptions in work flow to promptly and thoroughly clean up all spills that did occur. While the additional labor costs are difficult to quantify, \$1,000 was not an unreasonable estimate, given the size of the business and the number of employees.

#### *B. Gravity*

The DNR assessed \$4,000 for gravity of the violation. This was based on the importance of the permitting requirements to protect water quality, the actual discharge of storm water contaminated with pollutants into the storm sewer, and the number of days of violation. The DNR failed to justify this high gravity assessment. Although Mr. Herman conducted the salvaging portion of his business for some period of time without first obtaining the storm water permit, he was not charged any back permit fees and salvaging was a relatively small portion of his business operations. He applied for the permit promptly when directed to do so.

In addition, although storm water contaminated with petroleum was discharged to the storm sewer on March 13, 2007, it does not appear that this was a large spill and there was no evidence that the contaminants moved beyond the storm sewer and road ditch. There is no evidence that there were discharges to the storm sewer on multiple days. Moreover, although the property had been completely cleaned up by March 15, 2007 and has remained clean since that time, the Administrative Order was not issued until nearly a year later. Based on this record, the assessment for gravity of the violation should be reduced to \$1,000.

### *C. Culpability*

The DNR assessed \$2500 for culpability, but the record does not support the full assessment. A culpability assessment is warranted because Mr. Herman was negligent in implementing his pollution prevention plan following the issuance of the storm water permit, despite specific guidance from the DNR and warnings about the risk of contaminated runoff when the snow from the large storm melted. In addition, using a hose to drain standing water from the property likely accelerated the movement of contaminants to the storm sewer and the road ditch.

Although Anthony Herman should have known that his salvaging operations required a storm water permit, there is no evidence that his initial failure to obtain a permit was intentional. Although he disagreed with the directive to obtain a permit, Anthony Herman applied for the permit promptly. In the eleven months after this incident and prior to the issuance of the Administrative Order, Mr. Herman has complied with all permit requirements. These factors support a \$1000 assessment for culpability.

### ORDER

IT IS THEREFORE ORDERED that the issuance of Administrative Order No. 2008-WW-03 is hereby AFFIRMED, in part, and MODIFIED, in part. The finding that the Appellant violated Department statutes and rules is AFFIRMED. The \$7,500 civil penalty is reduced to \$3,000.

Dated this 6th day of October, 2008.

*Margaret LaMarche*

Margaret LaMarche  
Administrative Law Judge  
Department of Inspections and Appeals  
Wallace State Office Building-Third Floor  
Des Moines, Iowa 50319

cc: Ernest Kersten  
Attorney at Law  
805 Central Avenue South, Suite 603  
Fort Dodge, Iowa 50501 (CERTIFIED)

Jon Tack, Attorney  
Legal Services Bureau  
Iowa Department of Natural Resources  
Wallace State Office Building-Third Floor (LOCAL)

Any party may appeal a proposed decision to the director of the department of natural resources within 30 days after receipt of the proposed decision and order. The agency may also decide on its own to review a proposed decision, notwithstanding the absence of a timely appeal by a party. 561 IAC 7.17(5).

IOWA DEPARTMENT OF NATURAL RESOURCES  
WALLACE STATE OFFICE BUILDING  
DES MOINES, IOWA 50319

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IN THE MATTER OF

APPELLANTS' AMENDED NOTICE  
OF APPEAL

ANTHONY HERMAN AND  
MIGHTY GOOD USED CARS

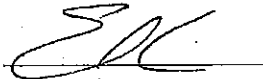
NO. 8-DNR-18

Appellants, Anthony Herman and Mighty Good Used Cars, as provided by the Iowa Code and the Iowa Administrative Code, give notice of their appeal of the above-described proposed administrative order. Appellants dispute factual basis for the proposed administrative order, the legal conclusions and penalties.

Appellants ask that Director of the Iowa Department of Natural Resources dismiss the proposed order and grant the Appellants all other relief to which they show themselves entitled.

Respectfully submitted,

By:



Ernest Kersten  
Attorney for Anthony Herman and Mighty  
Good Used Cars  
ISBA 14186  
805 Central Avenue, Suite 603  
Fort Dodge, Iowa 50501  
Telephone 515/576-3977  
Fax 515-576-0941  
Email [ernestkersten@yahoo.com](mailto:ernestkersten@yahoo.com)

Certificate of Service

I certify that I sent a copy of the foregoing notice of appeal by email mail to the Jon Tack, IDNR, on November 4, 2008.

  
\_\_\_\_\_  
Ernest Kersten

**IOWA DEPARTMENT OF NATURAL RESOURCES  
WALLACE STATE OFFICE BUILDING  
DES MOINES, IOWA 50319**

**IN THE MATTER OF**

**ANTHONY HERMAN AND  
MIGHTY GOOD USED CARS**

**APPELLANTS' NOTICE OF APPEAL**

**NO. 8-DNR-18**

Appellants, Anthony Herman and Mighty Good Used Cars, as provided by the Iowa Code and the Iowa Administrative Code, give notice of their appeal of the above-described proposed administrative order. Appellants dispute factual basis for the proposed administrative order, the legal conclusions and penalties.

Appellants ask that Environmental Protection Commission dismiss the proposed order and grant the Appellants all other relief to which they show themselves entitled.

Respectfully submitted,

By: 

Ernest Kersten  
Attorney for Anthony Herman and Mighty  
Good Used Cars  
ISBA 14186  
805 Central Avenue, Suite 603  
Fort Dodge, Iowa 50501  
Telephone 515/576-3977  
Fax 515-576-0941  
Email [ernestkersten@yahoo.com](mailto:ernestkersten@yahoo.com)

**Certificate of Service**

I certify that I sent a copy of the foregoing notice of appeal by regular mail to the Jon Tack, IDNR, on November 3, 2008.

  
Ernest Kersten

75533 NOV07'08 4-1126